80-512

Supreme Court, U. S.
FILED
SEP 30 1980
MICHAEL RODAK, JR., CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BALTIMORE COUNTY, MARYLAND,
Petitioner,

v.

RAYMOND INTERNATIONAL BUILDERS, INC.,
and
J. E. GREINER, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

LEONARD S. JACOBSON,
HARRY S. SHAPIRO
Baltimore County,
Office of Law,
Court House
Towson, Maryland 21204
(301) 494-3146

Attorneys for Petitioner

THE PAUL M. HARROD COMPANY, BALTIMORE, MARYLAND 21234

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Baltimore County, Maryland, the Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Court of Special Appeals of Maryland entered in the above-entitlted case on April 11, 1980, and the order dated July 3, 1980, of the Court of Appeals of Maryland which denied a Petition for Writ of Certiorari relating to said case.

QUESTIONS PRESENTED

1. Was the Court of Special Appeals correct when it held that, following *Hollerbach v. United States*, 233 U.S. 165 (1914), Baltimore County was liable to a contractor for cost overruns on a bridge repair contract, where the contractor allegedly relied on data provided by the county, even though the contractor was warned the data was forty years old and should not be relied upon?

2. Was the Court of Special Appeals correct when it remanded the case to the trial court for damages alone, and against the Petitioner alone, when the Respondent, J. E. Greiner, Inc., was also an original Defendant and had prepared the contract documents upon which the allegations of misrepresentations had been made?

3. Did the failure on the part of the State Court to apply your Petitioner's defenses of sovereign immunity and the statute of limitations deprive your Petitioner of its rights of due process under the Constitution of the United States?

PARTIES

The Petitioner herein, Baltimore County, Maryland, was a Defendant before the Trial Court, and was an Appellee before

the Court of Special Appeals of Maryland. The Respondent herein, Raymond International Builders, Inc., was the Plaintiff before the Trial Court, and was the Appellant before the Court of Special Appeals. The Respondent herein, J. E. Greiner, Inc., was a Defendant before the Trial Court in the action brought by Raymond International Builders, Inc., and was a Cross-Defendant in the Trial Court proceedings in a Cross-Claim filed against such party by Baltimore County, Maryland, before the Trial Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. i

PARTIES i

OPINIONS BELOW. 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES 3

STATEMENT OF THE CASE. 4

REASONS FOR GRANTING THE WRIT. 7

CONCLUSION 14

TABLE OF CITATIONS

Cases

Accord, Alpert v. Commonwealth,
258 N.E.2d 755 (Mass., 1970). 11

Accord, Dravo Corp. v. Municipality of Metropolitan
Seattle, 79 Wash. 2d 214, 494 P.2d 399
(S.C. of Wash. 1971) 10

Archie and Allen Spiers, Inc. v. United States,
296 F.2d 757 (Court of Claims, 1961) 8

Branna Construction Corp. v. West Allegheny
Joint School Authority, 430 Pa. 214,
242 A.2d 244 (S.C. of Pa., 1968) 9,10

Page

Condun-Cunningham, Inc. v. Day, 258 N.E.2d 264
(Ct. of Common Pleas of Ohio,
Cuyahoga County, 1969) 11
Detroit and I. R. Co. v. Guthrie,
72 F.2d 126 (6th Cir., 1934).....10
Elkan v. Sebastian Bridge District,
291 F. 532 (8th Cir., 1923).....9
Gevyn Construction Corp. v. United States,
357 F. Supp. 18 (S.D.N.Y., 1972).....11
Hollerbach v. United States,
233 U.S. 165 (1914).....i,2,6,7,8,9,10,11,13
MacArthur Brothers Co. v. United States,
258 U.S. 6 (1922).....7
Robert E. McKee, Inc. v. City of Atlanta,
414 F. Supp. 957 (N.D.Ga. 1976).....9
Penn Central Transportation Co. v. United States,
366 F. Supp. 1161 (Del., 1973) 11
Pitt Construction Co. v. City of Alliance,
12 F.2d 28 (6th Cir., 1926).....10
Transbay Construction Co. v. City and County
of San Francisco,
35 F. Supp. 433 (N.D. Cal., 1950) 10
Wunderlich v. State, 56 Cal. Rptr. 473,
423 P.2d 545 (S.C. of Cal., 1967).....10

Constitutional Provisions and Statutes

Annotated Code of Maryland, Article 25A, Section 1A ...3,13
Constitution of the United States,
Fourteenth Amendment 2,3,12,13

INDEX TO APPENDIX

Appendix A—Opinion of the Court of
Special Appeals of Maryland ..... A. 1

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BALTIMORE COUNTY, MARYLAND,
Petitioner,

v.

RAYMOND INTERNATIONAL BUILDERS, INC.,
and
J. E. GREINER, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland whose judgment is herein sought to be reviewed is reported at 412 A.2d 1296. By its order dated July 3, 1980, the Court of Appeals of Maryland denied Petitioner's Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257, as the Petitioner herein is alleging that its rights and privileges under the Fourteenth Amendment to the Constitution have been violated by the State Court decision. Additionally, the principal issue in the case relates to the State Court construction and application under the Supreme Court of the United States case of *Hollerbach v. United States*, 233 U. S. 165 (1914), and your Petitioner is alleging that the State Court erroneously construed and applied such 1914 case and overlooked a more recent Supreme Court and other federal decisions relating to the issue in *Hollerbach*. Under Rule 19 of the Rules of the Supreme Court, the Supreme Court may consider the application of the decisions of the Supreme Court in order to clarify in a uniform way such application. Additionally, under Rule 20 of the Rules of the Supreme Court, the Supreme Court may give consideration to the imperative public importance of the matter, and the Petitioner is alleging that the application by the State Court in the case at bar could detrimentally affect municipal and state contracts throughout the United States contrary to the public interest and not in accordance with the current view of the Supreme Court of the United States.

Although the element of damages in this case was remanded to the trial court for further consideration as to the Respondent, Raymond International Builders, Inc., the case was fully and finally determined as to the Respondent, J. E. Greiner, Inc. Additionally, the case was fully and finally determined as to the defenses of sovereign immunity and statute of limitations raised by the Petitioner.

Therefore, it is the Petitioner's belief that this case is in a posture of finality for review by this Honorable Court with reference to some or all of the issues.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 25A, Section 1A of the Annotated Code of Maryland

> "Article 25A—Chartered Counties of Maryland 1A.
>
> (A) Unless otherwise specifically provided by the laws of Maryland, a chartered county, and every officer, department, agency, board, commission or other unit of county government may not raise the defense of sovereign immunity in the courts of this state in an action in contract based upon a written contract executed on behalf of the county, or its department, agency, board commission, or unit by an official or employee acting within the scope of his authority. . . .
>
> SECTION 7. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1976.
>
> Approved May 4, 1976."

STATEMENT OF THE CASE

On July 17, 1972, the Respondent, Raymond International, Inc. (hereinafter referred to as "Raymond") and Petitioner, Baltimore County, Maryland, entered into a written contract relating to underwater repairs to the Wise Avenue Bridge in Baltimore County. The bridge was in excess of forty years old.

The contract documents in this case were made up of various documents which included an invitation to bid, specifications, proposal, agreement, special provisions and various documents. Section 5 of the Special Provisions states:

> "Original construction data has not been verified by actual field measurements and the conditions observed during the underwater inspections and tests may have changed since the date on which furnished to the contractor for general information purposes only and do not purport to represent existing field conditions. It shall be the contractor's sole responsibility to verify by actual field measurements, inspections and tests and data which may be of significance to him in the preparation of his bid."

The contract document specifically states that "Special Provisions shall govern over specifications, supplemental specifications and plans." In addition the invitation to bid states at page 1-03 that:

> "Bidders must examine the drawings and specifications carefully and must make a personal examination of the location and nature of the proposed work."

Sheet "X" of the contract documents states in the notes:

> "Note 2–contractor to verify all dimensions in field. Note 5–dimensions shown taken from as built plans and have not been verified by actual measurement. The contractor shall verify any and all dimensions as may be required to complete satisfactorily all work under this contract."

The Proposal, which is a part of the contract, clearly states that:

> "The undersigned hereby declare that they have carefully examined the Form of Contract Specifications, Special Provisions and Drawings forming a part of the same and have their satisfaction examined the locality of the proposed work. . . ."

Substantial testimony was produced at trial showing that Raymond could have determined the underwater conditions, prior to its submitting its bid for the repair job, through the use of soundings, observations and underwater probes. Raymond should have foreseen the underwater conditions which existed because of the age of the bridge (over forty years old) and the repeated statements in the plans and specifications that the drawings and measurements were original construction data and had not been verified. The contract had clear and unambiguous statements to the effect that the data was old, was given for general information purposes only and did not purport to represent existing field conditions. In addition the contract stated that it was Raymond's responsibility to verify any data which might be of significance in the preparation of its bid.

The original contract price for the repair job was $213,000. Immediately after the contract was awarded to them, Raymond decided that it did not have enough profit in the job and attempted to persuade the county to change the plans and specifications in order to create more profit. After repairs

began, Raymond alleges that it discovered that specifications provided by the county were inaccurate. The testimony also revealed that in September of 1972, Raymond was fully aware of the underwater conditions, and could have taken any legal action it sought fit to rescind the contract, or other legal measures that might have been designed to protect any legal interest it might have had in this matter. However, Raymond took no such action.

Notwithstanding the fact that Raymond took no action in September of 1972 or soon thereafter, it later alleged that it had to perform unforeseeable work at an increase in cost in excess of one million dollars. Raymond did not institute any action against Baltimore County until May 26, 1976; more, the documents clearly stated that the bidder should not rely on the information given in preparing its bid.

Respondent then instituted an appeal in the Court of Special Appeals of Maryland. Relying heavily on this Court's holding in *Hollerbach v. United States*, 233 U. S. 165 (1914), the Court of Special Appeals held that the Trial Court had erred in holding that the Raymond was not justified in relying upon the data provided. The Court of Special Appeals further held that Raymond was entitled to compensation for the unforeseen or negligently misrepresented conditions which they encountered in the performance of the contract. However, the Court of Special Appeals determined that the Respondent, J. E. Greiner, Inc., the independent contractor who prepared the specifications for the bid, was not responsible in any way despite the fact that the proceedings contained a cross-claim brought by your Petitioner against said Greiner. The Court of Appeals of Maryland denied, without opinion, Baltimore County's Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because there is an urgent need for clarification and guidance from the Supreme Court as to when municipal corporations and states will be held liable for the accuracy of information provided to prospective bidders and when exculpatory clauses will be upheld.

In *Hollerbach v. United States*, 233 U. S. 165 (1914), the Court held that where the government has made a positive representation upon which the contractor has justifiably relied, the government will be held liable for increased costs if the representations prove to be inaccurate. In *MacArthur Brothers Co. v. United States*, 258 U. S. 6 (1922), the Court held that where there has been no positive assertion there can be no liability.

> "To hold the government liable under such circumstances would make it an insurer of the uniformity of all work, and cast upon it responsibility for all of the conditions which a contractor might encounter, and make the cost of its projects always an unknown quantity." *Id.* at 13.

There is a need for the Supreme Court to provide guidance for the gray area between *Hollerbach* and *MacArthur*. In the sixty-six years since the Court handed down its decision in *Hollerbach*, the Courts have differed widely in applying it. There is great confusion in the federal and state courts as to when there has been a positive assertion upon which the contractor is justified in relying. Some courts have even used *Hollerbach* to hold the government absolutely liable for information provided to contractor, even where the contractor has clearly been warned that the data may be inaccurate and should not be relied upon. *Raymond International, Inc. v. Baltimore County* is a good example of such an erroneous application of

Hollerbach. Raymond was clearly warned that the information provided to it was from original construction drawings, which were more than forty years old, and that data should not be relied upon unless the contractor verified it for itself. The Court of Special Appeals of Maryland held that following *Hollerbach* the Court was liable when the information allegedly proved to be inaccurate. The Court of Special Appeals of Maryland and other courts have effectively interpreted *Hollerbach* as holding governments absolutely liable for information provided to contractors. Clearly the Court did not intend this to be the effect of its decisions in *Hollerbach* and *MacArthur*.

The confusion existing in the federal and state courts can be clearly seen by examining cases where the fact situations were similar but the court's decisions were vastly different. In *Archie and Allen Spiers, Inc. v. United States*, 296 F.2d 757 (Court of Claims, 1961), the court was faced with a situation similar to that in *Raymond International*. The Navy had requested bids on a contract to refurbish and repair its pipelines on several piers. The proposal contained a clause telling bidders to

> "inspect carefully the work in place and satisfy themselves as to the character and amount of work to be removed, re ewed, or replaced. . . ."

The contract drawings contained statements that the "contractor shall verify all dimensions and conditions at the site." The contractor failed to verify the data on the drawings before submitting his bid. The data was inaccurate and the contractor brought suit for the cost overruns which resulted. The court held that the government was not liable for the overruns. The court recognized *Hollerbach* but held that it did not remove all cautioning and exculpatory clauses from contracts. The contractor was not justified in relying upon the data supplied by the government.

In *Elkan v. Sebastian Bridge District*, 291 F. 532 (8th Cir., 1923), the court held that the government was not liable where representations made in construction plans were inaccurate. The construction plans for a bridge contained a profile of test borings from the bridge site. The contract contained a clause stating that:

> "data furnished to bidders. . .are to be considered as approximate and bidders must assume the risk of having to carry the foundations to a greater or less depth without altering their prices."

The contractor used the government's data to determine how much work was required. When the foundations had to be dug deeper, he filed suit to recover his cost overruns. The court held that *Hollerbach* did not require the government to be held liable under these circumstances.

In *Robert E. McKee, Inc. v. City of Atlanta*, 414 F. Supp. 957 (N.D.Ga. 1976), the court stated that if a contract clearly places the risk of uncertainty on one of the parties then that party must absorb the losses from unexpected conditions. The court found that following *Hollerbach* two conditions must be met to void an exculpatory clause. It must be unrealistic to expect the bidders to uncover error on their own and the misrepresentation must be material. According to the court, the state is not liable when it has done little more than represent the results of an investigation and the bidder knew or should have known of the factual basis of these representations. The government does not become an insurer merely by providing information to contractors.

The federal courts are not alone in holding that *Hollerbach* does not require governments to pay cost overruns when they provide data to a contractor. In *Branna Construction Corp. v.*

West Allegheny Joint School Authority, 430 Pa. 214, 242 A.2d 244 (S.C. of Pa., 1968), the prospective bidders were provided with test boring information. The contract stated:

> "No responsibility is assumed by the owner or architect for subsurface conditions, such information is given for guidance only. Bidders shall not rely on data, bidders shall make their own investigation."

The Pennsylvania Supreme Court recognized *Hollerbach* but held that the exculpatory clause was a sufficient manifestation of the intent of the government that the contractor should not rely upon subsurface conditions as represented by plans and specifications. In *accord, Dravo Corp. v. Municipality of Metropolitan Seattle*, 79 Wash. 2d 214, 494 P.2d 399 (S.C. of Wash. 1971); *Wunderlich v. State*, 56 Cal. Rptr. 473, 423 P.2d 545 (S.C. of Cal., 1967); *Detroit and I. R. Co. v. Guthrie*, 72 F.2d 126 (6th Cir., 1934).

As stated previously, the courts are not in agreement on their interpretation and application of *Hollerbach*. In *Pitt Construction Co. v. City of Alliance*, 12 F.2d 28 (6th Cir., 1926), the contract contained an exculpatory clause to the effect that the bidders are required to examine the site and inform themselves of the magnitude of the work involved and the conditions and difficulties which would be encountered in performing the work. The depths of existing excavations shown on blueprints were stated as being "about." The Depths were inaccurate and the contractor brought suit for his cost overruns. The court held that the contractor was entitled to accept and rely upon the data provided by the city government, despite the exculpatory clause.

In *Transbay Construction Co. v. City and County of San Francisco*, 35 F. Supp. 433 (N.D. Cal., 1950), the bid invitation for a dam construction project stated that the quantities stated

in the contract were estimates only and the bidders were to make careful, personal examinations of the proposed work. Citing *Hollerbach* the court held that where the estimates proved incorrect the contractor could recover his cost overruns.

The Court of Special Appeals of Maryland is not the only state court which has followed this line of reasoning. In *Condun-Cunningham, Inc. v. Day*, 258 N.E.2d 264 (Ct. of Common Pleas of Ohio, Cuyahoga County, 1979) the county had made available to the bidders soil and foundation investigation reports. The reports stated that they were not part of the construction plans and were merely a source of supplementary information. The contract also stated that the bidder was required to examine the site and the contractor warranted that he had fully investigated the project and was aware of all the characteristics of the work. The court held that where the county makes tests results available to a bidder, the bidder is justified in relying upon the data and the county warrants that the information is accurate. In *accord, Alpert v. Commonwealth*, 258 N.E.2d 755 (Mass., 1970); *Penn Central Transportation Co. v. United States*, 366 F. Supp. 1161 (Del., 1973); *Gevyn Construction Corp. v. United States*, 357 F. Supp. 18 (S.D.N.Y., 1972).

In the sixty-six years since *Hollerbach*, the size and number of government construction contracts has increased tremendously, as has the involvement of the federal government in funding construction projects. The integrity of federal, state and municipal contracts is in jeopardy unless the Court makes a clear and definitive statement as to when a government will be held liable for information provided to contractors and when exculpatory clauses will be upheld. If contractors dealing with state and municipal governments have a free hand in claims for overruns, the taxpayers shall have to bear the brunt of the inevitable financial burden. If government cannot budget expenses for capital improvement projects and make

contracts accordingly, the fiscal affairs of our governments will become chaotic. *Raymond International, Inc. v. Baltimore County* presents the Court with a clear opportunity to make a definitive ruling in this confused and chaotic area.

The proceedings before the Trial Court involved five or six weeks of testimony and the consideration of numerous exhibits by the Trial Court. The hearing before the Court of Special Appeals of Maryland was intended to test the validity of various legal principles applied to the case at bar by the Trial Court. However, as indicated by the opinion of the Court of Special Appeals, the said Appellate Court made numerous findings of fact without having the benefit of hearing the testimony and examining the exhibits in the light of such testimony.

It is your Petitioner's belief that such a factual determination by said Appellate Court constitutes a violation of the due process rights of your Petitioner under the Fourteenth Amendment to the Constitution of the United States. The determination of said Appellate Court further excluded factual issues relating to proximate cause and the obligations of the Respondent, J. E. Greiner, Inc., to your Petitioner in accordance with contracts between said parties, which contracts were filed as evidence in the Trial Court. At the very least, your Petitioner believes and avers that the entire case should have been remanded to the Trial Court for further proceedings relating to liability and damages with the legal direction of the said Appellate Court relating to the legal principles to be applied by the Trial Court to the facts and evidence presented.

The failure on the part of the Special Court of Appeals to remand the entire case to the Trial Court constituted a final determination as to the issue of liability involving your Petitioner and Raymond International Builders, Inc., and involved a determination as to all issues between your Petitioner and J. E. Greiner, Inc., which your Petitioner believes to be an

erroneous conclusion in the light of the due process rights of your Petitioner and in the light of an appropriate application of the Supreme Court cases cited herein.

In addition to the substantial and important issues relating to *Hollerbach* and the Fourteenth Amendment to the Constitution of the United States, this Honorable Court should consider the defenses of sovereign immunity and the statute of limitations as presented by your Petitioner in the State Court. The Petitioner believes that the failure to apply such defenses by the State Court violated the rights of due process of your Petitioner.

Until July 1, 1976, when Article 25A, Section 1A of the Annotated Code of Maryland was changed, the county had the benefit of the defense of sovereign immunity in contract actions (Chapter 450 of the Laws of Maryland, 1976).

The claims of Raymond International in this proceeding originated prior to July 1, 1976, which made sovereign immunity applicable to the claims asserted against your Petitioner. When the Court of Special Appeals of Maryland remanded the proceeding to the Trial Court for damages, it failed to apply the defenses of sovereign immunity which were legally raised in the State Court.

With reference to the statute of limitations defenses, the testimony indicated that Raymond was fully aware of underwater conditions in September of 1972, but did not file any action until 1976 which was long after the three-year statute of limitations applicable had run. Petitioner believes and avers that the failure of the State Court to apply the defense of statute of limitations detrimentally affected the rights of due process of your Petitioner in the State Court proceeding.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

LEONARD S. JACOBSON
County Solicitor

HARRY S. SHAPIRO
Chief Assistant County
Solicitor

Baltimore County Office of Law
Courthouse
Towson, Maryland 21204

Attorneys for Petitioner

APPENDIX A

REPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND
No. 714
September Term, 1979

RAYMOND INTERNATIONAL, INC.

v.

BALTIMORE COUNTY, MARYLAND, et al.

Gilbert, C.J.
Thompson
Liss,
JJ.

Opinion by Liss, J.

Filed: April 11, 1980

This appeal by appellant, Raymond International, Inc., arises out of a judgment rendered in a non-jury trial in the Circuit Court for Baltimore County in which the presiding judge ruled that Baltimore County, one of the appellees, was indebted to the appellant in the amount of $18,431.98. At the same time, the trial judge entered a verdict for costs in favor of the remaining appellee, J. E. Greiner, Inc. Appellant filed the within appeal from these judgments.

By invitation to bid in May of 1972, Baltimore County solicited bids for underwater repairs to the bascule piers of the Wise Avenue Bridge over Bear Creek. Bidders were supplied with plans and specifications prepared for the County by Greiner. The proposed repairs consisted of the removal of deteriorated concrete from the bases of the piers and the placement of aggregate concrete in lieu of the deteriorated material. The bridge was originally built about thirty years ago. It was of the bascule type with two main piers which encompassed the channel of the river. The piers were of concrete resting on piles driven into the river bottom. Their reconstruction was contemplated to be accomplished by driving additional piles into the river bottom and encircling the piling with a cofferdam consisting of interlocking sheet piling driven into the bottom of the river and extending out of the water thus forming a boxlike structure. The cofferdam is erected and sealed in order to permit the water to be removed from the interior of the structure. The sealing of the cofferdam is accomplished by placing in its bottom a mass of concrete heavy enough to act as a plug and sufficient to counteract the pressure of the water. The placement of this mass of concrete is achieved by the "tremie" method which requires a tube to be lowered into the water through which concrete flows that settles on the bottom of the cofferdam. Subsequent to this operation, the water in the cofferdam is removed and work on the bridge pier may be completed free of the water. The mass of concrete in the bottom of the cofferdam is known as "tremie concrete," and

when construction or repair of the bridge pier is completed, the sheet piling of the cofferdam is removed and the "tremie" is abandoned by being left in place.

Over the years after the original construction of the bridge, Greiner conducted regular inspections of the bridge including the piers. In 1971, Greiner reported deterioration of the bridge piers below the waterline. This deterioration was determined to be of a progressive nature. Based on the data gathered including test borings and inspection by divers, Greiner came to the conclusion that the piers needed immediate repairs. Greiner communicated with Raymond which had some expertise in the making of underwater repairs. Raymond's representatives recommended a repair procedure which contemplated a jacketing of the piers with preplaced aggregate concrete. This procedure is a construction technique used in underwater work by which stones are placed in a form with a cementitious material (grout) pumped into the form displacing the water and forming concrete.

At the request of the County, Greiner prepared contract documents for the recommended repairs in order that the County could solicit bids. The documents included specifications, drawings, informational drawings, an addenda, an invitation to bid and other general provisions. Bids were solicited from a limited group of bidders who were thought to have the specialized abilities to perform the work. The group included Raymond which ultimately submitted a bid substantially below the bid of the next lowest bidder. Raymond and the County entered into an agreement by the terms of which Raymond was to finish the work in 100 days. Failure to do so made the contractor liable for liquidated damages under the contract. The County promised to obtain for Raymond a necessary right of way. Raymond was to be paid on a unit price basis the approximate sum of $213,000 based on the 230 cubic yard quantity estimated by Greiner and the County to be the amount

of aggregate concrete required to complete the job. The work to be performed consisted primarily of cleaning around Piers Nos. 3 and 4 of the bridge, forming and pouring preplaced aggregate concrete around the deteriorated faces of the piers, and making repairs to the submarine cables.

After the repairs began, Raymond contends it discovered that Greiner's specifications were inaccurate. It produced witnesses who stated that: (1) the material surrounding the piers was not soft as represented, but contained large pieces of concrete, pile butts, old timbers and steel; (2) the tremie was irregular with variations up to 1.5 feet; (3) no tremie existed in some areas; (4) only an average of two inches of deteriorated concrete could be chipped away, rather than the six inches represented in the plans and specifications which resulted in the projected total of 230 cubic yards of concrete not being able to be placed; and (5) the tremie was so weak in places that the form could not be anchored. Raymond contended below and contends here that as a result of the inaccuracy of Greiner's specifications it was required to perform unforeseeable increased work. Raymond also complained particularly that instead of the 230 cubic yards of aggregate concrete estimated to be used, it utilized and was paid for only 114 cubic yards. Raymond urges that its unit price as bid was computed by spreading its fixed costs over the 230 cubic yards stated in the plans and specifications and that the County paid for only 114 yards which deprived Raymond of more than half of its computed contract price. Raymond advised the County in a summary of claim filed on January 30, 1976, that while its original bid was $213,000, as a result of the misrepresentations included in the plans and specifications and the unforeseeable conditions arising out of the misrepresentations, its actual expenditure to complete the project amounted to $1,095,804.30. This calculation is apparently not disputed. Baltimore County rejected the claim and refused any adjustment in its contract with Raymond.

Suit was then filed by Raymond against Greiner and the County. The declaration was based on alleged fraud, negligent misrepresentation, breach of warranty and breach of contract. Raymond sought compensation for the additional costs incurred as a result of the unforeseen conditions of the piers, the return of liquidated damages retained by the County, and an award for punitive damages. During the course of the bench trial which lasted for many weeks, the trial judge granted Greiner's motion to dismiss at the conclusion of Raymond's case. At the conclusion of the entire case, the court awarded Raymond $900 representing rental payments made by the appellant for rights of way and $17,531 being the compensation withheld by the County which was due Raymond. The appellant, unsatisfied with the judgment of the trial judge, thereupon filed this appeal.

The issues to be decided are:

I. Whether the trial judge erred in holding that the plaintiff was not entitled to rely on the conditions, quantities and representations contained in the contract?

II. Whether the trial court erred in holding that the plaintiff was not entitled to compensation for the unforeseen or misrepresented conditions encountered in the performance of the contract?

III. Whether Greiner's motion to dismiss at the close of Greiner's case was improperly granted?

IV. Whether the County's motion raising preliminary objection was improperly granted on the issue of sovereign immunity?

V. Whether the trial judge erred in denying plaintiff's claim for an equitable adjustment in time and compensation due to a 50.1% underrun in preplaced aggregate?

I, II, V

One of the principal issues at trial was whether Raymond was justified in relying on the conditions, quantities and representations contained in the contract documents. Baltimore County in its defense relied principally on the contract documents which were filed as exhibits in this case. These documents included the invitation to bid, specifications, the proposal, the agreement, special provisions and various drawings. Included in the contract documents was the following which appeared in Section 5 of the special provisions:

> Original construction data has not been verified by actual field measurements and the conditions observed during the underwater inspections and tests may have changed since the date on which they were made. Therefore, the above described data are furnished to the Contractor for general informational purposes only and do not purport to represent existing field conditions. It shall be the Contractor's sole responsibility to verify by actual field measurements inspections and tests and data which may be of significance to him in the preparation of his bid.

The contract documents specifically stated that: "Special provisions shall govern over specifications, supplemental specifications and plans." The County points out that the invitation to bid at page 1-03 states: "Bidders must examine the drawings and specifications carefully and must make a personal examination of the location and nature of the proposed work."

In addition, the proposal which was made a part of the contract documents required the bidders to agree as follows:

> The undersigned hereby declare that they have carefully examined the Form of Contract, Specifications, Special Provisions and Drawings forming a part of the same and have to their satisfaction examined the locality of the proposed work and agreed to furnish all labor, tools, materials, machinery, equipment and other means of construction called for in the manner provided in the Contract, Specifications, Special Provisions and Drawings thereto and requirements under them of the Engineer. . . .

Sheet "X" which also was made a part of the contract documents provided:

> Note 2–contractor to verify all dimensions in field.
>
> Note 5–dimensions shown taken from as built plans and have not been verified by actual measurement. The contractor shall verify any and all dimensions as may be required to complete satisfactorily all work under this contract.

Relying on these provisions, the County urgently contends that the trial judge was correct when he held that there was no "justifiable reliance" by the appellant on the conditions stated to exist at the Wise Avenue bridge by the County's engineer, Greiner, and that the trial judge committed no error when he held that: "[T]he contract documents that finally formed the contract clearly placed the burden to the Plaintiff to make a reasonable inspection to determine if these conditions were as depicted as in the contract documents."

The legal issue boils down to a question of whether Raymond was required to verify independently the information upon which it based its bid, or whether Raymond was justified in relying on the information supplied by the County and its engineer as to the plans and specifications for the project.

The seminal case on the subject is *Hollerbach v. United States*, 233 U. S. 165, 34 S.Ct. 553, 58 L.Ed. 898, which was decided by the Supreme Court in 1914. That controversy involved a contract between the appellant Hollerbach and the United States Government for the repair of a dam. In its specifications for the contract, the Government stated that the dam was backed with broken stone and sediment. As the contractor proceeded with the work of removing the material, it was discovered that the backing of the dam was composed of a soft, slushy sediment and that the required excavation of the dam was substantially greater than that stated in the contract documents. The contract contained several exculpatory clauses which were stated as follows:

> It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.
>
> * * * * * * * * * * *
>
> It is expected that each bidder will visit the site of this work, the office of the lockmaster, and the

> office of the local engineer and ascertain the nature of the work, the general character of the river as to floods and low water, and obtain the information necessary to enable him to make an intelligent proposal. [233 U. S. at 167-68, 34 S.Ct. at 554.]

In spite of the Government's attempt to make the contractor responsible for his own inspection, the investigation of the site and the work to be done under the contract, the Supreme Court held:

> [T]he specifications assured them of the character of the material, a matter concerning which the Government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt. If the Government wished to leave the matter open to the independent investigation of the claimants it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity. See *United States v. Stage Co.*, 199 U.S. 414, 424. [233 U.S. at 172, 34 S.Ct. at 556.][1]

---

[1] *See also* United States v. Spearin, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918); Christie v. United States, 237 U.S. 234, 35 S.Ct. 565, 59 L.Ed. 933 (1915).

Appellant also cites *Robert E. McKee, Inc. v. City of Atlanta*, 414 F. Supp. 957 (N.D. Ga. 1976). In that case, the results of test borings were gratuitously provided to bidders along with specifications and other contract documents. The contract contained a clause in which the owner disclaimed any responsibility for the accuracy of the test results or for any conclusions drawn from them. The contract specifically provided that the test boring data were not to be considered a part of the contract. The contractor sued for misrepresentation because it discovered the level of rock was substantially higher than had been represented by the test boring.

The District Court in *McKee, supra*, at 959, held that it is clear "the government does not become an insurer merely by providing certain information" to the contractor. That Court, in determining whether the Government was liable for misinformation which it furnished to the bidder, posed two questions which must be examined: (1) "whether the contractor could have discovered the true facts through *reasonable* investigation[?]" and: (2) what "is the materiality of [the] misrepresentation itself[?]" *Id.* at 960.

Condon-Cunningham v. Day, 22 Ohio Misc. 71, 258 N.E.2d 264 (1969) involved a suit in which damages were allowed to a highway contractor as a result of misleading soil tests even though the contract provided that the test results were not part of the contract and that the contractors were obliged to make their own inspection. In examining the issue whether the contractor could have discovered the true facts for itself, the Court said:

> What were the bidders to do? Was each bidder to run these tremendously expensive core boring tests not knowing whether or not he would get the contract? Under defendant's contention there would be practically no bidders. A bidder would be faced with this

> dilemma. Shall I bid on what is presented to be and run the risk of loss if the information is not correct or shall I run core boring tests at great expense, amounting to thousands of dollars, which expense I must bear on my own if I do not secure the contract? [258 N.E.2d at 274-75.]

See also Michigan Wisconsin Pipeline Co. v. Williams-McWilliams Co. v. United States, 551 F.2d 945 (5th Cir. 1977); *Foster Construction C. A. & Williams Bros. Co. v. United States*, 435 F.2d 837 (1970); *Alpert v. Commonwealth*, 357 Mass. 306, 258 N.E.2d 755 (1970).

There is one case from the Court of Appeals in which a similar controversy was addressed. That case is *Linz v. Schuck*, 106 Md. 220, 67 A. 286 (1907), in which a contractor was hired to excavate a cellar under appellant's property. Before submitting a price, the contractor inquired about the nature of the soil whereupon he was taken by the owner to a property across the street from the subject property and shown a cellar which the owner stated had been constructed without any difficulty. When the contractor began the work, however, it was ascertained that the building stood on a three-foot crust of hard ground under which were muddy, swamp-like conditions. It was conceded that the contractor could have ascertained the condition of the earth under the house by digging a test hole. However, the contractor relied on the owner's representations without performing any tests. Suit for additional compensation due to substantial and unforeseen difficulty was brought by the contractor. In affirming a judgment for the contractor, the Court of Appeals said:

> When two parties make a contract based on supposed facts which they afterwards ascertain to be incorrect; and which would not have been entered into by the one party if he had known the actual conditions

> which the contract required him to meet, not only Courts of justice but all right thinking people must believe that the fair course for the other party to the contract to pursue is either to relieve the contractor of going on with his contract or to pay him additional compensation. [106 Md. at 230.]

We have very carefully reviewed the record extract in order to determine whether the trial court was clearly erroneous in its conclusions as to the law and the facts. The record extract establishes that the specifications as prepared by Greiner on behalf of Baltimore County were materially wrong and substantially inaccurate. The evidence disclosed no substantial dispute that the conditions as found by Greiner and reported to the County and to the bidders were substantially different from those encountered by Raymond when it began to perform the work required by the contract. Greiner and the County knew or should have known the representations regarding the deterioration of the piers and the quantities of concrete necessary for the repairs were inaccurate as Greiner had been engaged by the County over a period of years to inspect the underwater portions of the bascule piers. Greiner actually had thirteen contracts with the County between 1968 and 1972 which required Greiner to make underwater inspections of the bascule piers, tremies and piles, and field supervision of the piers.

Greiner, as agent for the County, submitted to Raymond information and plans which represented an average surface deterioration depth of six inches in spite of the fact that Greiner had reports from its divers that indicated the average depth of deterioration was only two inches. Therefore, in its bid proposal, Greiner required a computation based on quantities and information which Greiner knew or should have known was incorrect. To suggest that Raymond, who had been solicited to bid on the job by the County and Greiner, should have conducted diving tests in order to verify the information given it in the

plans and specifications prepared by Greiner seems to us to place an undue burden on Raymond. Entirely apart from the substantial cost of any such verification, it is obvious that Greiner required a period of almost four years and innumerable test divings to compile the information necessary to prepare the plans, specifications and bid proposals, and that even in view of that lengthy time frame the information it had was incorrect. We conclude that Raymond was not reasonably able to discover the true facts for itself and was, therefore, entitled to rely on the representations made by the County and Greiner.

As to the materiality of the representations, there can also be no dispute. Raymond established that its bid was conditioned upon the erroneous representation in the contract documents that a total of 230 cubic yards of aggregate concrete would be required to perform the contract. The actual amount required was approximately 114 cubic yards. The bid was based on a unit price per square yard, and because the County paid only for the actual amount used, the appellant was deprived of over half its contract price. In addition, because of the incorrect information supplied to Raymond, the contractor was required to perform additional work in connection with the use of the prefabricated forming system and to utilize new methods for sealing and anchoring the form bottoms. As a direct result of the variations from the conditions as represented in the plans and specifications, Raymond was unable to complete the project within the 100 days provided in the contract. As Raymond failed to perform within the time specified, the County withheld the sum of $37,000 notwithstanding that performance was impossible within the 100 days required by the contract.

Appellee Baltimore County relies on *Trionfo v. Board of Education of Harford County*, 41 Md. App. 103, 395 A.2d 1207 (1979), in which Judge Thompson of this Court exhaustively discussed the law of a contractor's right to recover on a

theory of misrepresentation. There we held, as we hold here, that the plaintiff must establish a right to rely on the misrepresentation. In *Trionfo*, we found no right to rely because the test boring data furnished to contract bidders were supplied only in exchange for a written release from the bidders designed to absolve the board from any responsibility for the accuracy or completeness of the information and to protect the board from assessments for additional work performed pursuant to assumptions made based on the supplied data. No such release provision exists in this contract. We, therefore, find *Trionfo* inapplicable to the present case. We conclude that the trial court erred in holding that the appellant was not entitled to rely on the conditions, quantities and representations contained in the contract. We further hold that the trial court erred in its finding that the appellant was not entitled to compensation for the unforeseen or negligently misrepresented conditions encountered in the performance of the contract.

We perceive an additional error in the trial court's rulings. The contract documents expressly incorporated the specifications of the State of Maryland with the contract between Raymond and the County. Section 10.09-3 of those specifications expressly provides for an equitable adjustment for major discrepancies in quantities as follows:

> Whenever a final quantity for any Major Contract Item shows that either the Proposal Quantity of said item, or the quantity specified therefor in any Supplemental Agreement has been actually overrun or underrun by more than 25 percent; the Contractor and Commission shall then be allowed an equitable adjustment in time and/or compensation as though said overrun or underrun had been anticipated by the Engineer and ordered, under the provisions of Section 10.04-3.

The term "major contract item" is defined in the State specifications as follows:

> Major Contract Items shall be the original Contract item of greatest cost, computed from the original Contract price and estimated quantity, or lump sum price and such other original Contract items next in sequence of lower cost, computed in like manner, necessary to show a total cost at original prices and quantities of not less than 60 per cent of the original Contract cost and all other Contract items shall be considered as minor items.

The record extract, we think, clearly establishes that the major contract items in this contract were the preplaced aggregate contract amount of $115,000 and the removal of the fender systems amounting to $34,000 and totaling more than 60 percent of the original contract price. The evidence is undisputed that the quantity of preplaced concrete used amounted to a 50 percent underrun of the prescribed quantities set forth in the contract. Under these circumstances, Raymond was entitled to an equitable adjustment in time or compensation. The trial court initially came to the same conclusion, but inexplicably without reliance on either the law or the facts changed that opinion and concluded that Baltimore County was entitled to a favorable verdict on the issues of the failure to renegotiate and on the issue of an equitable adjustment. The lower court said:

> The other three issues were the failure to renegotiate an equitable adjustment. At one point in the trial, I think I indicated to counsel, that I was really somewhat impressed that this is an issue that the plaintiff has a right to a particular equitable adjustment. I was very impressed by the testimony of Mr. Morris

> on this issue. He dwelled at length, but after reviewing the contract documents and listening to arguments of counsel, I've come to the conclusion that the defendant is correct that this is just not called for under the contract documents, and I could not, without breaking the rules of the law, allow that amount and I find that I would have to find for the defendant, Baltimore County, on those issues failing to renegotiate, and on the equitable adjustment.

We find nothing in the record extract on the basis of the facts or the law which supports that conclusion.

III

We find no error in the trial court's granting of Greiner's motion to dismiss Raymond's suit against Greiner on the grounds of misrepresentation at the conclusion of Raymond's case. Raymond contends that Greiner waived its right to file such a motion to dismiss because it offered testimony before the conclusion of the plaintiff's case and that this amounted to a clear violation of Maryland Rule 535. We do not agree. The record discloses that Greiner's counsel read into the record a short portion of the deposition of one of Greiner's executives, the major portion of which had been put into the record by Raymond's counsel. The clearly expressed purpose of the reading of the short excerpt of the deposition was for clarification of the witnesses' testimony. We do not find that this amounted to such a violation of either the letter or the spirit of Rule 535 as to make Greiner's motion to dismiss a "nugacity." *See Smith v. State Roads Comm.*, 240 Md. 525, 214 A.2d 792 (1965).

It would serve no useful purpose to again restate the five prerequisites of proof required to sustain an action for misrepresentation or deceit. It is sufficient to state that the appellant failed to produce evidence from which could be found or

inferred that Greiner intended to *defraud* by reason of the allegedly incorrect information it furnished to Raymond. Even assuming that Greiner was negligent in preparing the information it furnished to the bidders, that would not be sufficient to satisfy the plaintiff's burden as a misrepresentation induced by negligence or ignorance will not sustain an action for fraud. *Peurifoy v. Congressional Motors, Inc.*, 254 Md. 501, 255 A.2d 332 (1969). There was no testimony establishing clear and convincing evidence that Greiner's representations in this case were made for the specific purpose of defrauding the plaintiff. This is particularly so when we note that at the time the information was supplied to the prospective bidders no one had any knowledge as to who the successful bidder would be. It is not contended in appeal that the trial court was otherwise in error with respect to Greiner's motion.

IV

The trial court was correct in its ruling on the County's motion raising preliminary objection on the ground of sovereign immunity as to the first and second counts of Raymond's declaration which were founded on the torts of fraud and negligent misrepresentation. *See Jekofsky v. State Roads Comm.*, 264 Md. 471, 287 A.2d 40 (1972); *Godwin v. County Commissioners of St. Mary's County*, 256 Md. 326, 260 A.2d 295 (1970).

JUDGMENT REVERSED AS TO BALTIMORE COUNTY; REMANDED FOR NEW TRIAL AS TO DAMAGES ONLY. JUDGMENT AFFIRMED AS TO GREINER. COSTS TO BE PAID BY BALTIMORE COUNTY.